

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Communications Assistance for)
Law Enforcement Act)

CC Docket No. 97-213

COMMENTS

of the

ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT
OF SMALL TELECOMMUNICATIONS COMPANIES

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking¹ seeking comment on the rules it should adopt to implement the Communications Assistance for Law Enforcement Act (CALEA).² OPASTCO is a national trade association representing over 500 independently owned and operated telephone companies serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over two million customers.

¹ Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, Notice of Proposed Rulemaking, FCC 97-356, (rel. October 10, 1997) (Notice, NPRM).

² Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.) (CALEA, the Act).

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OPASTCO has been a regular participant in the Federal Bureau of Investigation's (FBI) proceedings to implement CALEA and welcomes the opportunity to comment on the responsibilities CALEA imposes on the Commission.

II. CONSISTENT WITH CONGRESSIONAL INTENT AND THE PUBLIC INTEREST, THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO MINIMIZE CALEA REPORTING REQUIREMENTS FOR SMALL ILECS

The Commission is correct to note that many of the small and rural incumbent local exchange carriers (ILECs) subject to CALEA may never be called upon to conduct electronic surveillance.³ Most OPASTCO members, to date, have never been requested to conduct lawful, court-ordered electronic surveillance on behalf of law enforcement. In addition, due to their small staffs, detailed, time consuming reporting requirements are disproportionately more onerous for small carriers and can potentially hamstring normal operations. OPASTCO therefore fully supports the FCC's proposal to provide small ILECs with the option to simply certify that it observes procedures consistent with the Commission's systems security rules in lieu of filing a detailed statement describing its security policies, processes, and procedures.⁴

OPASTCO also supports the Commission's proposal to define small ILECs for this purpose in terms of a \$100,000,000 annual operating revenues threshold, indexed to account for inflation. This definition would be the most administratively simple for both the FCC and small ILECs as it is already in use as a threshold for determining those ILECs that have to

³ NPRM at para. 34.

⁴ *Id.* at para. 35.

comply with the Commission's Automated Reporting Management Information System (ARMIS) requirements.⁵ Furthermore, the established index would allow for growth in revenues due to inflation and permit carriers to calculate the new threshold annually.

OPASTCO believes that the Commission's proposals to minimize the reporting requirements for small ILECs are highly consistent with Congressional intent and in the public interest. CALEA is not "regulatory" in nature. Its purpose is to ensure that law enforcement can continue to conduct authorized electronic surveillance in the wake of rapid advances in telecommunications technology. Congress did not intend to bog down carriers in regulation and paperwork as they modify their networks to make them compliant with the law. If a small ILEC observes security procedures consistent with the Commission's rules, requiring it to file a detailed statement describing its security policies would serve no other purpose but to force the carrier to focus more energy on completing cumbersome paperwork and less time serving customers. The Commission's alternative to allow small ILECs to certify that they comply with the FCC's procedures is in the public interest and should be adopted.

III. THE COMMISSION MUST TAKE INTO CONSIDERATION THE DELAY IN IMPLEMENTATION OF CALEA WHEN REVIEWING REQUESTS UNDER THE "REASONABLY ACHIEVABLE" STANDARD AND EXTENSION OF THE COMPLIANCE DATE

The implementation of CALEA is not progressing as Congress had originally planned, making the January 1, 1995 "grandfather" cutoff date no longer reasonable and the compliance

⁵ Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Report and Order, 2 FCC Rcd 5770 (1987) (ARMIS Order), modified on recon., Order on Reconsideration, 3 FCC Rcd 6375 (1988).

date of October 25, 1998 unachievable. On October 23, 1997, the House of Representatives Crime Subcommittee of the Committee on the Judiciary held a hearing to determine why CALEA implementation is off-track and what needs to be done to remedy the situation. During the hearing, both industry representatives and lawmakers suggested that legislative action is necessary to push back the "grandfather" and compliance dates. If legislation is adopted revising these key dates that recognizes the additional time needed for carriers to comply with CALEA, then the concerns stated below will have been addressed. However, if Congress does not choose to act, OPASTCO believes that there are certain actions the FCC can and should take to address the current reality of the reasonableness and ability of carriers to comply with these dates.

- A. The Commission should establish an additional factor for consideration in its "reasonably achievable" determinations which states that the compliance of equipment, facilities, and services installed or deployed since January 1, 1995, but prior to manufacturers' commercial release of CALEA solutions, is not reasonably achievable**

Congress did not intend for carriers to pay for the retrofitting of existing facilities to comply with CALEA. Under CALEA, a minimum four year transition period was provided to allow for the development of safe harbor standards from which would soon follow the commercial availability of CALEA-compliant equipment. The transition period was intended to protect not only equipment already "installed" by 1995, but also equipment deployed

(i.e. designed or developed) prior to January 1, 1995 and subsequently installed.⁶ The legislative history states:

The bill requires the Federal government, with appropriated funds, to pay all reasonable costs incurred by industry over the next four years to retrofit existing facilities to bring them into compliance with the interception requirements. (H. Rept. 103-827, p. 16)

In addition, one of the criteria the FCC must consider in its “reasonably achievable” determination, is “the extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995.”⁷

It was Congress’ expectation that soon after January 1, 1995, manufacturers would have CALEA-compliant equipment ready to make commercially available. Unfortunately, CALEA’s implementation has not gone according to schedule. After considerable delay, an interim safe harbor technical standard was approved the week of December 1, 1997 by the Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS) and could still potentially be petitioned to the FCC by interested parties. Without a technical standard to work from until just one week ago, manufacturers have been unable to design equipment and software they are certain is compliant with the Act and compatible with other manufacturers’ architectures. Thus, a switch available today is no more CALEA-compliant than a switch available in 1994.

⁶ CALEA at Sec. 109(a).

⁷ *Id.* at Sec. 109(b)(1)(J) (emphasis added).

Meanwhile, small ILECs continue to install new equipment and software in their networks and provide new services to their customers with the fear that they will be responsible for the cost of retrofitting these upgrades when CALEA-compliant technology eventually comes to market. For small and rural carriers especially, with their limited resources, small subscriber base, and lack of scale economies, the cost of retrofitting all of their existing equipment would be overwhelming and could ultimately need to be recovered, in part, through higher rates. Certainly, Congress did not intend for small carriers and their customers to bear the burden of retrofitting equipment purchased at a time during which no CALEA-compliant technology was even available. In fact, it is likely that this eventuality is one of the reasons Congress established a mechanism allowing for the FCC's determination of "reasonably achievable." Therefore, OPASTCO urges the Commission to adopt an additional factor under Sec. 109(b)(1) which states, in essence, that compliance with the Sec. 103 capability requirements for all equipment, facilities, and services installed or deployed prior to the commercial availability of CALEA-compliant solutions will be deemed not reasonably achievable.

B. The Commission should automatically grant two year extensions of the CALEA compliance date for all equipment, facilities, and services of all requesting carriers

The Commission states that, because it is not clear whether requests for extensions of the Section 103 compliance date will be forthcoming, it does not propose to promulgate

specific rules regarding requests at this time.⁸ To the contrary, it is very clear that there will be requests for extensions of the October 25, 1998 compliance date -- and they will be coming *en masse*.

As discussed above, the delay in the adoption of a technical standard has led to a setback in the availability of CALEA-compliant technology, making compliance with the Section 103 capability requirements by the October 25, 1998 deadline impossible to meet. From the time standards are adopted, estimates range anywhere from 18 - 36 months for manufacturers to develop the necessary equipment and software for ILECs' networks. This means that these solutions will not be available to carriers until May 1999, at the earliest. From there, carriers need adequate time to install and test the new software or equipment in their existing networks.

According to the Act, the FCC may grant an extension of time if it determines that compliance with the assistance capability requirements is not reasonably achievable through application of technology available within the compliance period.⁹ By that criterion, all carriers will be eligible for an extension of time. Therefore, OPASTCO strongly recommends that, barring a legislative change to the compliance date, the FCC institute a rule stating that all requests for an extension will be deemed automatically granted for all of a carrier's equipment, facilities, and services for the maximum two years permitted, unless the

⁸ NPRM at para. 50.

⁹ CALEA at Sec. 107(c)(2) (emphasis added).

Commission specifically informs the carrier otherwise within a reasonable amount of time following the filing of the petition. The Commission should develop a simple, streamlined petition in which a carrier can certify that all of its equipment, facilities, and services are unable to comply with CALEA due to a lack of available technology.

Absent such a rule, the FCC faces the prospect of responding to potentially thousands of requests for extensions. Under Sec. 107(c)(1), petitions for extensions are to be made for specific equipment, facilities, or services that will be unable to comply. If carriers are required to request an extension for each individual component of their network that is unable to comply, the Commission will be swimming in a sea of petitions and required to respond to each and every one, while carriers would be unnecessarily saddled with preparing numerous filings -- with the relatively greatest burdens placed on small carriers.

Furthermore, of utmost concern to small LECs is the prospect of civil penalties of up to \$10,000 per day for noncompliance starting on October 25, 1998.¹⁰ Of course, a flat-rated penalty has the greatest impact on the smallest carriers and one of this magnitude would quickly lead to financial ruin for OPASTCO members. It therefore is imperative that the FCC remedy the situation now to avoid a fiasco for both carriers and itself.

V. THE COMMISSION SHOULD RECOGNIZE THAT A CARRIER MAY PETITION FOR, AND THE FCC MAY GRANT, MORE THAN ONE EXTENSION OF THE COMPLIANCE DATE

¹⁰ 18 U.S.C. 2522.

The NPRM is unclear as to whether or not the FCC recognizes that it may grant carriers additional extensions beyond the first two year extension of the compliance date. In the NPRM the FCC says that “the FCC may grant an extension of time until October 24, 2000...”¹¹ In fact, Sec. 107(c) of CALEA clearly states that “a telecommunications carrier...may petition the Commission for 1 or more extensions of the deadline...” (emphasis added). Thus, while the length of each extension can be no longer than two years, the FCC may grant a carrier as many extensions it determines are warranted based on the grounds that compliance with Sec. 103 is not reasonably achievable through application of technology available within the compliance period. This is an important fact for the Commission to recognize in the rules it promulgates regarding requests for extensions, as the delayed pace of implementation may require additional time beyond October 2000 for some carriers to comply.

V. CONCLUSION

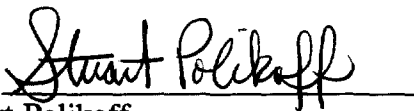
Consistent with Congressional intent and the public interest, OPASTCO supports the adoption of the Commission’s proposal to allow ILECs with less than \$100,000,000 in operating revenues, adjusted for inflation, to certify that it observes the Commission’s systems security rules. In addition, absent a legislative change to CALEA extending the January 1, 1995 “grandfather” date and October 25, 1998 compliance date, OPASTCO urges the Commission to: (1) establish an additional factor under Sec. 109(b)(1) stating that compliance of equipment installed or deployed prior to the availability of CALEA-based


¹¹ NPRM at para. 49.

technical solutions is not reasonably achievable; (2) develop a simple, uniform procedure for an automatic two year extension of the compliance date for all of a carrier's equipment, facilities, and services; and (3) recognize in its rules that it may grant carriers additional extensions of the compliance date beyond October 25, 2000. By adopting these recommendations, the FCC will help to minimize the burden of CALEA compliance on small and rural ILECs, permitting them to assist law enforcement in conducting lawfully authorized electronic surveillance while continuing to provide customers with quality service at reasonable rates.

Respectfully submitted,

**THE ORGANIZATION FOR THE
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